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# FOUCAULT AND TAX JURISPRUDENCE: ON THE CREATION OF A “DELINQUENT” CLASS OF TAXPAYER

BRET N. BOGENSCHNEIDER\*

## ABSTRACT

*In Discipline and Punish, Foucault described the role of the “disciplinary institution” in the formation of modern society. An example of such a modern Foucauldian disciplinary institution is the Internal Revenue Service (IRS). The IRS currently devotes a substantial portion of its enforcement efforts against small businesses and low-income individual taxpayers. The IRS collection activity, as directed against low-income taxpayers, often manifests in Foucault’s “Philadelphia”-style prison, but without walls. The delinquent taxpayer becomes the delinquent social class with a diminished earning capacity, thereby directly undermining the reformatory goal of punishment. This audit process is a very different enforcement process than applied to large corporate taxpayers where the IRS continues to follow a “policy of restraint” with regard to the auditing of aggressive corporate tax positions.*

## INTRODUCTION

We are much less Greeks than we believe. We are neither in the amphitheatre, nor on the stage, but in the panoptic machine, invested by its effects of power, which we bring to ourselves since we are part of its mechanism.<sup>1</sup>

The primary function of the Internal Revenue Service (“IRS”) is *not* to collect revenue. In fact, employers do most of the tax *collecting* on behalf of the IRS by withholding a portion of earnings from workers’ paychecks and simply remitting the funds directly to the IRS. Such collection procedure comprises the bulk of revenue collection activity by the

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1. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 217 (Alan Sheridan trans., Pantheon Books 1977).

Treasury Department of the United States.<sup>2</sup> The IRS thus operates in a fashion similar to a bank teller that must identify math errors on the deposit slip and then simply cash the checks. In terms of enforcement practices, the bulk of the IRS's audit activities are directed against small business owners and individual taxpayers who, for any number of reasons, might appear to be in error on the face of a tax return.<sup>3</sup> In many cases, however, the IRS's enforcement action relates to a matter of significant legal doubt, requiring the IRS to re-interpret tax law and then summarily inform the taxpayer that the "error" is a violation of the tax laws based on its subsequent legal interpretation.

The IRS's view of its enforcement function is dominated by a desire to seek a teleological "Truth" in the enforcement of the tax laws.<sup>4</sup> This implies that for every tax question there is a "correct," or determinative, legal answer.<sup>5</sup> However, in actual practice the tax law is *indeterminate*.<sup>6</sup> A tax enforcement strategy based on a *determinative* premise results in a tax administration that attempts to ensure that taxpayers "pay the right amount of tax, in the right jurisdiction and at the right time."<sup>7</sup> As might be expected, such a "Truth"-finding function results in very little enforcement revenue at all.<sup>8</sup> However, the United States Congress envisions the role of the IRS very differently from how the IRS views itself. Congress sees the

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2. INTERNAL REVENUE SERVICE, DATA BOOK 2014 3, 22 (2014), available at <http://www.irs.gov/pub/irs-soi14databk.pdf>.

3. *Id.* at 22–23.

4. Matthew T. King, *Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems*, 12 INT'L LEGAL PERSP. 185, 188 (2002) ("The inquisitorial search for Truth can be described as teleological. Punishing wrongdoers is a good; there is no right system, except that which leads to this good. So, as long as a suspected criminal is found out and punished, the methods of doing so are generally considered right, or just."); see generally DENNIS PATTERSON, *LAW AND TRUTH* (Oxford 1996).

5. Jeffrey Owens, *The Role of Tax Administrations in the Current Political Climate*, BULL. INTL. TAXN. 156, 160 (2013) ("Finally, for tax administration to effectively implement the tax laws and to ensure that MNEs and other taxpayers pay the right amount of tax, in the right jurisdiction and at the right time requires the governments to provide a clear legal framework and the resources that they need to achieve this."); but see Bret N. Bogenschneider, *Manufactured Factual Indeterminacy and the Globalization of Tax Jurisprudence*, 4 UNIVERSITY COLLEGE LONDON J. LAW & JURISPRUDENCE 250 (2015).

6. Leigh Osofsky, *Some Realism about Responsive Tax Administration*, 66 TAX L. REV. 121, 161 (2012); Mark Burton, *Responsive Regulation and the Uncertainty of Tax Law—Time to Reconsider the Commissioner's Model of Cooperative Compliance?* 5 EJOURNAL OF TAX RES. 71, 72 (2007) ("One critical aspect of the responsive regulation literature is that it assumes that the law is determinate.").

7. Owens, *supra* note 5, at 156.

8. IRS, *supra* note 2, at 22 (indicating approximately \$30 billion in aggregate adjustments recommended from the audit process for all taxpayers).

role of the IRS as a revenue-raising body with a reformatory purpose as well, particularly in the case of minor tax wrongdoing.<sup>9</sup>

The tax audit process for small taxpayers differs from the audit process for large corporate taxpayers. An IRS agent is directly assigned to the corporate taxpayer. The agent is typically present on site and assigned an office at the corporate headquarters. The corporation can ask any questions that it may have in advance of filing the return and vice versa. The assigned IRS agent thus operates much like a “partner” in the preparation of the tax return to the large corporation, providing an interactive and constantly present form of procedural and substantive due process.<sup>10</sup> Therefore, it becomes nearly impossible for a large corporate taxpayer to engage in wrongdoing. As such, the stated IRS policy is one of “restraint” in regards to large corporate taxpayers.<sup>11</sup> As explained by Snider: “Corporations were to be viewed as complicated organisms run by well-intentioned, well-educated management teams. Harmful acts in which they might—accidentally, of course—engage were better handled by gentle persuasion or education rather than by arrest and prosecution.”<sup>12</sup> When the “well-educated management teams” use their skills to avoid taxes and are thus required to prepare detailed accounting records of the uncertain tax positions (referred to in technical terms as “FIN48 workpapers”), the IRS assuages concern that it might ask to see the FIN48 workpapers in an audit with an outright policy statement of “restraint.”<sup>13</sup> The relevant IRS Announcement states as follows:

The Internal Revenue Service is expanding its policy of restraint in connection with its decision to require certain corporations to file

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9. Peter Halewood, *On Commodification and Self-Ownership*, 20 YALE J.L. & HUMAN. 131, 145 (2008) (“The body, as signifier of the crime against order, was sacrificed to right the social balance. Rehabilitation or conservation of this body was neither desirable nor thinkable; law demanded the public and visible erasure of the criminal body. Only with modernity did law, psychology and penology begin to consider the virtues of reconstituting the body and soul of the condemned through discipline, surveillance and labor.”).

10. See OECD, *Co-operative Compliance: A Framework: From Enhanced Relationship to Co-operative Compliance*, OECD Publishing (2013), available at <http://www.oecd.org/ctp/administration/co-operative-compliance.htm>.

11. IRS, *Announcement 2010-76*, “Requests for Documents Provided to Independent Auditors, Policy of Restraint and Uncertain Tax Positions,” available at <http://www.irs.gov/pub/irs-drop/a-10-76.pdf> (last visited Oct. 20, 2015).

12. Lauren Snider, *Theft of Time: Disciplining Through Science and Law*, 40 OSGOODE HALL L.J. 89, 91 (2002).

13. Bret Wells, *Voluntary Compliance: “This Return Might Be Correct but Probably Isn’t”*, 29 VA. TAX REV. 645, 656–67 (2010) (“The concern expressed in the comment letters was that this tax self-assessment would provide a “roadmap” for tax authorities to identify taxpayers for audit and for identifying issues for audit.”).

Schedule [Uncertain Tax Positions], Uncertain Tax Position Statement, and will forgo seeking particular documents that relate to uncertain tax positions and the workpapers that document the completion of Schedule UTP.<sup>14</sup>

To date, the IRS does not appear to have used the FIN48 records of a large corporation as part of the audit process.<sup>15</sup> In general, large corporations in the United States receive both procedural and substantive due process rights in an IRS examination far beyond anything afforded to any other class of persons under the U.S. Constitution.<sup>16</sup> For example, upon any technical change in the tax law, the drafter of the Treasury regulations is typically re-employed by a large accounting firm to advise large corporate taxpayers as a technical expert on how to avoid the very tax regulations that person just created. This might be appropriately referred to as “creative” due process (i.e., the special ability of large corporations to create and define the substantive tax procedure to which they are expected to comply). Small businesses and individuals are afforded no such “creative” due process. The closest historical corollary for special rights afforded to large corporations in the modern United States may be the special legal rights of the nobility and property owners in feudal societies.<sup>17</sup>

The audit process of the large corporate taxpayer is particularly distinguishable from that of individuals or small business taxpayers. The IRS keeps this latter group of taxpayers under a nearly constant state of electronic surveillance.<sup>18</sup> For these taxpayers, the IRS operates as an

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14. Zuba, *supra* note 11, at 1 (citing Financial Accounting Standards Board (FASB) ASC 740-10).

15. See Wells, *supra* note 13, at 656 (“Consequently, FIN 48 requires a company to create FIN 48 workpapers for each separate uncertain tax position and in those workpapers the company must provide the basis for its assertion as to why the company either believes that the tax position is sustainable (and thus the financial statement benefits are recognized in whole or in part) or must state the basis for why the company believes that the tax position is not sustainable”).

16. See Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1134–36 (1984).

17. FOUCAULT, *supra* note 1, at 192 (“In certain societies, of which the feudal régime is only one example, it may be said that individualization is greatest where sovereignty is exercised and in the higher echelons of power. The more one possesses power or privilege, the more one is marked as an individual, by rituals, written accounts or visual reproductions.”).

18. For an illustration of the inspecting “gaze” in the context of the modern advertising industry see, e.g., Allison Clyne Tschannen, *An Argument for Incentivizing Voluntary Regulation of the Fashion and Modeling Industries*, 6 WASH. U. JUR. REV. 421, 424 (2014) (“Just a gaze. An inspecting gaze, a gaze which each individual under its weight will end by interiorising to the point that he is his own overseer, each individual thus exercising this surveillance over, and against himself.”).

actuary and statistician to identify potential misdeeds.<sup>19</sup> As explained in detail by Professor Bryan Camp, the IRS audit process of individuals and small taxpayers is an “inquisitorial” process in which the decision-maker also collects the evidence to be used in making the decision.<sup>20</sup> Notably, there is no adversarial process in any tax proceeding as the IRS revenue agent cannot be adversarial against herself. Hence, the taxpayers who most need the adversarial proceeding are unable to access it.<sup>21</sup> The IRS operates as both the finder of fact and the decider of law. In lay terms, the IRS functions as the prosecutor, judge, and jury.

In the enforcement practice against small businesses and low-income taxpayers, the “Truth” is not relative, and there is no policy of restraint. The IRS will often use coercive, deceptive, or third-party queries to obtain whatever information it wants and will occasionally turn that information over to the United States Department of Justice for criminal prosecution. Indeed, the IRS may conduct its investigation against individuals and small businesses in secret and without regard to any Constitutional rights, particularly privacy rights, of the taxpayer. Foucault puts the current IRS enforcement practices in historical perspective as follows:

In France, as in most European countries, with the notable exception of England, the entire criminal procedure, right up to the sentence, remained secret . . . . The preliminary investigation was carried out “as diligently and secretly as may be”, as the edict of 1498 put it. . . . The magistrate, for his part, had the right to accept anonymous denunciations, to conceal from the accused the nature of the action, to question him with a view to catching him out, to use insinuations. (Up to the eighteenth century, lengthy arguments took place as to whether, in the course of “captious” questioning, it was lawful for the judge to use false promises, lies, words with double meaning—a whole casuistry of legal bad faith.)<sup>22</sup>

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19. Jonathan Simon, *The Ideological Effects of Actuarial Practices*, 22 LAW & SOC'Y REV. 771, 774 (1988).

20. See generally Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 U. FLA. L. REV. 1 (2004).

21. Bryan T. Camp, *The Failure of Adversarial Process in the Administrative State*, 84 IND. L.J. 57, 124 (“Ironically, the adversarial check of judicial review is simply unavailable to the class of taxpayers we should worry about the most. . . . By definition, they do not have the ability to gather the information necessary to trigger the exercise of discretion, much less to trigger a meaningful review. By definition, they do not have the money to hire someone to do it for them. These are serious barriers to voice. Nor are taxpayer assistance clinics able to serve anywhere close to a reasonable number of taxpayers.”).

22. FOUCAULT, *supra* note 1, at 35.

The fundamental unfairness of the IRS audit process to individual taxpayers was the subject of Congressional hearings, resulting in the appointment of a Taxpayer Advocate at the IRS.<sup>23</sup> Nonetheless, for the individual or small business taxpayer who comes under audit, it immediately becomes clear that the tax system of the United States still operates under the pre-Renaissance inquisitorial tax collection system. But, in the modern period, an even worse fate has been devised. The modern tax collector may assess taxes not only on what he finds at the present time but also upon property or profits the taxpayer might get in the future.<sup>24</sup> The possibility to levy on *future* profits of the individual taxpayer or small business represents the greatest expansion of the taxing power in the history of mankind. This is analogous to the financial “execution” of the taxpayer, as described in lurid detail by Foucault. By taking future property to pay the levy of a tax on a prior period, the process thus creates a real debtor’s prison for the taxpayer without walls.<sup>25</sup>

Thus, the primary purpose of the IRS is not to collect revenue but instead to create within the United States a “delinquent” class of persons who are in a permanent state of tax debt and who can never escape. Rather than confine these persons behind the walls of a prison and impose Foucauldian-style discipline with the making of license plates, the delinquent class is now allowed to roam free; they are allowed to exist and to provide for their children without a bank account, relying instead upon “payday lenders” and check-cashing stores. The IRS uses the term “delinquent” taxpayers to describe this class of persons. In *Discipline and Punish*, Foucault uses the same terminology for the “delinquent class” within society. Foucault argues that the bureaucracy of the prison itself is the creator and cause of delinquency within society.<sup>26</sup> Here, the parallel argument is that the bureaucracy of the IRS itself is the leading preventable cause of social delinquency in the United States.

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23. Camp, *supra* note 20, at 91 (“Congress transformed the Office of the Taxpayer Advocate (OTA) from a function providing ‘internal’ administrative review to one providing quasi-adversarial review, with the effect of diluting the Service’s decisionmaking authority.”).

24. See IRS Publication 594, at 3 (“The IRS Collection Process. . . . We can attempt to collect your taxes up to 10 years from the date they were assessed.”).

25. Simon, *supra* note 19, at 798 (“Rather than concentrating power on particular “dangerous” subjects, actuarial technology changes the social context to make it immune to those subjects (who thus no longer need to be confined and controlled). Barricades are useless against a power that operates in the abstract space of statistical tables.”).

26. FOUCAULT, *supra* note 1, at 251 (“This other character, whom the penitentiary apparatus substitutes for the convicted offender, is the delinquent. The delinquent is to be distinguished from the offender by the fact that it is not so much his act as his life that is relevant in characterizing him.”).

The labeling of the tax “delinquent” as equivalent to the social delinquent, in Foucauldian terms, means that the punishment is not a rehabilitative process at all. In no way does the punishment of the tax delinquent fit the crime. A person that is delinquent to the IRS for just a few dollars can be forever labeled as a tax delinquent irrespective of whether the punishment constitutes an appropriate “exchange value” for the offense, thus rendering the delinquent subject to civil forfeiture and all the direct and indirect costs associated therewith.<sup>27</sup> The idea of tax “punishment” is fundamentally absurd insofar as in many cases the tax delinquent is perfectly innocent of any wrongdoing and is merely subject to the (re)definition of “Truth” by the IRS as part of the audit process. Of course, such (re)definition of “Truth” is unknowable to anyone prior to the audit but particularly unknowable to the taxpayer who is then subjected to an extraordinary degree of retribution.

The social delinquent, by definition, cannot be rehabilitated. This categorization of persons relates to a classification of the person as a delinquent and not a redress of the crime itself. As explained by Camille Nelson, “[A]s Foucault would posit, in the move from ‘offender’ to ‘delinquent’ police become less concerned with acts and more concerned with identity.”<sup>28</sup> Thus, society gives up on this class of citizens. Tax punishment is fundamentally about the assertion of power over the noncompliant taxpayer, a financial analog to the torture and execution of the deviant in the public square. The execution of a tax lien on any property of a tax delinquent accomplishes this objective directly.<sup>29</sup> Further proof of the retributory purpose of IRS collection activity is that collection revenue is simply immaterial to total revenue.<sup>30</sup>

The creation of such a delinquent social class represents an extraordinary fiscal policy disaster for the United States. The term “tax orphans” might be used for children of people wrongly classified as tax delinquents and represent an opportunity cost to society from such misclassification. Tax orphans bear much of the incidence of the IRS tax

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27. *Id.* at 244 (“The same goes for the duration of the punishment; it makes it possible to quantify the penalties exactly . . . but it also runs the risk of having no corrective value . . . The length of the penalty must not be a measurement of the ‘exchange value’ of the offence, it must be adjusted to the ‘useful’ transformation of the inmate during his term of imprisonment.”).

28. Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race and Mental Status*, 15 BERKELEY J. CRIM. L. 1, 63 (2010).

29. FOUCAULT, *supra* note 1, at 9 (“Now the scandal and the light are to be distributed differently; it is the conviction itself that marks the offender with the unequivocally negative sign”).

30. IRS Data Book, *supra* note 2, at 28 (indicating total audit adjustments are less than 1% of total collections).



enforcement activity. When the IRS reports (as it typically does) that it has happily collected a meager \$1.9 billion in annual revenue through levy on “delinquents,”<sup>31</sup> objective observers should ask: As the non-delinquent taxpaying members of society, ought we to cheer in celebration of the imposition of “justice” and “Truth” over the Foucauldian social delinquents or should we cry? Tax expenditures on all children were \$114 billion in 2013 and total expenditures were \$464 billion in 2013.<sup>32</sup> The \$1.9 billion in IRS tax collection from the “tax delinquents” may not offset even the incremental amount of tax expenditures directly *caused* by its heavy-handed tax enforcement practices. But, to measure only the *direct* tax expenditures is clearly an underestimation. This article explains that IRS collection and enforcement activity further fails to achieve most of the goals of punishment itself, as set forth by Foucault in *Discipline and Punish*.

#### I. ON THE IRS’S INQUISITORIAL VERSION OF “TRUTH”

The modern tax system is embedded in American society. Thus, it is difficult, from within the panoptic machine, to imagine anything different from what actually exists. One might intuitively expect that the IRS would focus its enforcement efforts almost entirely on the taxpayers with the greatest revenue and, therefore, the greatest opportunity to take advantage of the tax laws. Instead, the IRS focuses its enforcement efforts almost exclusively on the persons with the least revenue and, therefore, the least opportunity to take advantage of the system.

The explanation for this enforcement strategy relates at least in part to the IRS’s inquisitorial version of “Truth.” As a preliminary matter, the IRS does not operate to “[pluck,] as to procure the largest quantity of feathers with the least possible amount of squealing,” as was Jean Baptiste Colbert’s suggestion.<sup>33</sup> This supports the general observation that the IRS is not primarily focused on the collection of revenue. Rather, the IRS sees itself in quasi-religious or chivalric terms. Camp explains:

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31. *Id.*; Camp, *supra* note 21, at 72.

32. HEATHER HAHN ET AL., KIDS’ SHARE 2014: REPORT ON FEDERAL EXPENDITURES ON CHILDREN THROUGH 2013 11 (2014), available at <http://www.urban.org/UploadedPDF/413215-Kids-Share-2014.pdf>.

33. David A. Wells, *Taxation*, in 3 CYCLOPAEDIA OF POLITICAL SCIENCE, POLITICAL ECONOMY, AND OF THE POLITICAL HISTORY OF THE UNITED STATES 870, 871 (Lalor ed., Melbert B. Cary & Co., 1884) (quoting Jean-Baptiste Colbert, finance minister of Louis XIV).

Undergirding the entire self-assessment regime is the idea that for every taxpayer, there exists a “true” tax liability. . . . Until 1998, the idea of a true tax liability was implicit in the Service’s mission statement, which stated that “[t]he purpose of the IRS is to collect the proper amount of tax revenue.”<sup>34</sup>

But, of all the great minds engaged in tax law analysis around the world, few would agree that the tax laws can only be interpreted in black and white. The tax law is indeterminate both as a matter of law and as a matter of enforcement practice. The IRS accordingly operates along the lines of *Don Quixote* engaged in a proverbial crusade toward a romantic notion of the tax laws in modern society.<sup>35</sup> This represents an organizational, teleological, systemic approach to tax enforcement that manifests in an extraordinary, institutionalized impracticality.

Where Truth is not understood as relative to the aggregate amount of dollars collected, then an increase in teleological “Truth” is indeed more likely to be achieved against individual or small business taxpayers than large corporate taxpayers. As such, the IRS finds that it is better to direct its efforts against roughly 461,000 individual taxpayers per year claiming the earned income tax credit.<sup>36</sup> The portion of low-income taxpayers audited as compared to high-income taxpayers audited is in a ratio of approximately 2-to-1.<sup>37</sup> This increases the potential for IRS audits of low-income persons that do not have any potential to raise enforcement revenue regardless of the actual outcome of the audit.

Several commentators have raised the distinction between an adversarial and an inquisitorial legal process in relation to the practice of the IRS. King describes the distinction as follows: “Based upon philosophically based notions, the practice in adversarial countries reflects a pragmatic search for the truth; inquisitorial practice, to the contrary,

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34. Camp, *supra* note 20, at 7–8; King, *supra* note 4, at 188 (“[T]he Truth sought by the inquisitorial judge consists mainly of a full reckoning of what happened in the crime so the proper sentence can be levied.”). See Bogenschneider *supra* note 5, at 252, 265 (“Factual indeterminacy in tax law is distinguishable from general legal indeterminacy. Indeterminate fact patterns typically arise where a finding of a separate body of law, such as corporate law, is taken as a matter of fact for the application of tax law . . . there may be factual or legal indeterminacy on a particular transaction but also enforcement indeterminacy in that an aggressive tax transaction may never be challenged.”).

35. Miguel De Cervantes, *Don Quixote* (Edith Grossman trans., Harper Collins 2003).

36. IRS, *supra* note 2, at 27.

37. *Id.*; Nelson, *supra* note 28, at 59–60 (“Disciplinarians therefore create schemas of coercion that tend to be focused disparately on some communities and individuals than upon others. Thus only some people are subject to such ‘strict subjection,’ and not all bodies are disciplined equally. Like other disciplinarians, police order ‘human multiplicities’ based upon the varied identities of individuals in society.”).

reflects its philosophical tradition in its drive to discover an absolute Truth.”<sup>38</sup> Specifically as to the tax law, Camp argues that the inquisitorial legal system is based on an expanded role of the decision maker and a preference for absolute truth.<sup>39</sup> In general, the Continental European tradition adopts a more inquisitorial approach than the United States. The missing adversarial nature of an IRS proceeding is particularly apparent under the legal tradition of the United States with its focus on individual rights. As explained by King: “In the United States, a premium is placed on individual rights . . . This is significantly different from the situation in inquisitorial, civil-law countries, where the judge applies the law with a supposed clear, settled meaning.”<sup>40</sup> King concludes: “In this respect, the pragmatic truth outlook can be labeled deontological from a Truth-as-good standpoint. In the American adversarial process, the good outcome can derive only from a right process; there is no good outcome . . . if the process . . . is not followed.”<sup>41</sup>

Camp goes on to conclude that the inquisitorial tax process is fundamentally “un-American.”<sup>42</sup> This may be true. However, this conclusion fails to understand that the inquisitorial legal system sets out first and foremost to enlighten society. King explains as follows:

The Continental Inquisitorial Tradition. The essential notions that arise from this philosophical tradition are that the state is the primary actor and the individual is the primary recipient of the action. It is the job of the society to enlighten and shape its members, so it should be trusted to do so. A great deference, then, must be given to the state in conducting its activities for the benefit of its constituent individuals; after all, that is what the state was founded to do. This means its methods, if within reason, cannot be questioned as long as it achieves the goal of enlightenment.<sup>43</sup>

Thus, the outcome of any audit is not that the state collects some particular amount of money. The fundamental idea is that the citizen is enlightened about what the IRS determined the “Truth” to be. The conclusion is that the IRS determined the “Truth” as it was all along, often reversing any misguided ideas about the tax laws along the way.

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38. King, *supra* note 4, at 230.

39. Camp, *supra* note 20, at 18–19.

40. King, *supra* note 4, at 189–92.

41. *Id.* at 189.

42. Camp, *supra* note 20, at 17.

43. King, *supra* note 4, at 194.

The jurisprudential observation is simply that the IRS operates as the Don Quixote-inspired lawgiver, dispensing its “Truth” about the tax laws to the taxpayers of the United States. Any tax practitioner can attest to the extraordinary difficulty that arises in tax practice when a taxpayer challenges the administrative ruling of the IRS in federal court *and prevails*. The IRS does not automatically acquiesce to the reversal of its judgment by a federal court as precedent for other taxpayers. Indeed, the IRS goes on with its version of the “Truth,” even when the adversarial legal process in the United States concludes to the contrary. Two primary examples are the *Cohan* rule regarding the documentation of business expenses<sup>44</sup> and the *Zellerbach* rule relating to the statute of limitations on the filing of an amended return.<sup>45</sup>

## II. FOUCAULT’S *DISCIPLINE & PUNISH* AS APPLIED TO TAX JURISPRUDENCE

In effect the offence opposes an individual to the entire social body. . . . It is an unequal struggle: on one side are all the forces, all the power, all the rights. . . . [T]he offender becomes the common enemy. Indeed, he is worse than an enemy, for it is from within society that he delivers his blows—he is nothing less than a traitor, a “monster”. How could society not have an absolute right over him? How could it not demand, quite simply, his elimination?<sup>46</sup>

The vocabulary used by Foucault in relation to social institutions is directly analogous to the law of taxation. The IRS uses “examination” to identify the “delinquent.”<sup>47</sup> Furthermore, the idea of taxation as power is well established in American jurisprudence.<sup>48</sup> The social institutions empowered with the enforcement of taxation are inherently powerful. Bruce Arrigo describes the power of social institutions as follows:

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44. See *Cohan v. Comm’r*, 39 F.2d 540 (2d Cir. 1930).

45. See *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934).

46. FOUCAULT, *supra* note 1, at 90.

47. *Id.* at 184 (“The examination. The examination combines the techniques of an observing hierarchy and those of a normalizing judgement. It is a normalizing gaze, a surveillance that makes it possible to qualify, to classify and to punish. It establishes over individuals a visibility through which one differentiates them and judges them. That is why, in all the mechanisms of discipline, the examination is highly ritualized. In it are combined the ceremony of power and the form of the experiment, the deployment of force and the establishment of truth.”).

48. *McCulloch v. Maryland*, 17 U.S. 316 (1819) (“[T]he power to tax involves the power to destroy”).

Foucault's position that power—embedded within and communicated through doctrinal texts—produces, led him to assert that the proliferation and dissemination of these narratives operate as discursive mechanisms of social control, surveillance, and disciplining. More problematic, however, were the punitive effects of these narratives, effects experienced both materially and existentially.<sup>49</sup>

The origin of punishment is the exercise of power by Foucault's "Prince."<sup>50</sup> In a public display, the prince remedies the crime against a sovereign power by inflicting punishment upon the body of the criminal. But, upon the arrival of the more modern state, the focus changes from a punishment levied on the body of the wrongdoer to a correction of the will.<sup>51</sup> Halewood explains as follows: "[I]n liberalism, the will is essential and the body is surplus; yet, the body is essential to the construction of liberalism's account of rights—the unspoken referent from which the autonomous will is abstracted and with which it is contrasted."<sup>52</sup> Liberal society is thus concerned not only with the body but also the will. Foucault uses the term "soul," which does not mean a religious "soul" but refers to a civil soul of a person representing the goodwill to participate as a citizen within society.<sup>53</sup>

Although Foucault mentions taxation only once in *Discipline and Punish*, the overall implications are quite significant. Foucault explains as follows:

[O]ne can live only from the product of one's labour, through the practice of a profession or from the product of the labour of others, by thieving; but, although the prison did not force offenders to

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49. Bruce A. Arrigo, *Madness, Citizenship, and Social Justice: On the Ethics of the Shadow and the Ultramodern*, 23 LAW & LITERATURE 405, 417 (2011).

50. FOUCAULT, *supra* note 1, at 47 ("Besides its immediate victim, the crime attacks the sovereign: it attacks him personally, since the law represents the will of the sovereign; it attacks him physically, since the force of the law is the force of the prince.").

51. *Id.* at 19 ("What would be the best way of rehabilitating him"? A whole set of assessing, diagnostic, prognostic, normative judgements concerning the criminal have become lodged in the framework of penal judgement. Another truth has penetrated the truth that was required by the legal machinery; a truth which, entangled with the first, has turned the assertion of guilt into a strange scientifico-juridical complex.").

52. Peter Halewood, *Law's Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 IOWA L. REV. 1331, 1378 (1996).

53. Arrigo, *supra* note 49, at 418 ("Foucault's notion of the 'soul' refers to the internalization of disciplinary knowledge/truth, absent the need for external mechanisms of restraint or coercion (e.g., torture, banishment, ostracism, or other corrective action). This is the moment at which the individual is thoroughly immersed in the language and logic of the communicative system in use.").

work, it seems to have reintroduced into its very institution and, obliquely, by means of taxation, this levying by some on the labour of others: The question of idleness is the same as in society; it is from the labour of others that the convicts live, if they do not exist from their own labour. The labour by which the convict contributes to his own needs turns the thief into a docile worker.<sup>54</sup>

Thus, society itself must be concerned with tax crimes, because they represent an indirect crime against those that pay taxes. The key point is that the purpose of the punitive institution must now be to reform the “lazy” into productive workers to prevent indirect thievery from the working class.<sup>55</sup> As the regulatory institution for the taxing power is the IRS, one might thus expect that the IRS tax enforcement policy would be designed in every respect to create productive workers.<sup>56</sup> In reality, however, the IRS often achieves just the opposite.

### III. STANDARDS OF NORMATIVITY AND THE DELINQUENT TAXPAYER

[T]he delinquent is a criminal element, a type of person who must constantly be watched and ultimately punished as he falls outside the pact, disqualifies himself as a citizen and emerges, bearing within him as it were, a wild fragment of nature; he appears as a villain, a monster, a madman, perhaps, a sick and, before long, “abnormal” individual.<sup>57</sup>

The filing of the tax return is traditionally viewed as a self-assessment of tax liability in a voluntary tax system.<sup>58</sup> If the IRS questions the self-assessment by the taxpayer, it may conduct an audit and then issue an

54. FOUCAULT, *supra* note 1, at 243 (internal quotation marks omitted).

55. Snider, *supra* note 12, at 94 (“However, linking productivity, or the lack thereof, to criminality is new. Transforming the unproductive employee into the criminal is significant. Not that law has ever been absent from the workplace; rather, employment and contract law have always focused on regularizing the employee-employer relationship. Still, it is significant because calling something “criminal” is an ideological and moral claim.”).

56. Arrigo, *supra* note 49, at 417 (“In the modernist framework, the apparatuses of power and domination are built around regulatory institutions (e.g., the legal, the psychiatric, the penal, and the medical). These apparatuses promote particularized regimes of knowledge/truth whose effect is the panoptic inspection, disciplining, and normalization of the subject.”).

57. Nelson, *supra* note 28, at 58 (internal quotation marks omitted).

58. Camp, *supra* note 20, at 5 (“Like many clichés, however, ‘voluntary self-assessment’ is true in a more significant sense than it is false. The tax determination process ultimately rests on taxpayers disclosing their financial affairs and paying what they owe—through withholding or otherwise—without overt government compulsion.”).

assessment.<sup>59</sup> The IRS assessment functions as a civil judgment against the taxpayer.<sup>60</sup> The full details of administrative process before the IRS are nicely explained by Camp.<sup>61</sup> If the taxpayer disagrees with the IRS assessment, he or she may file for relief in tax court or federal district court (if the tax liability is pre-paid), but, in any case, the taxpayer will bear the burden of proof. This is the sole procedure for small businesses and individual taxpayers. Of course, large corporations are afforded not only the rights described here but also the *special rights* of substantive, procedural, and “creative” due process as described earlier.

An alternative view of the administrative tax filing process is illustrated by Foucault. In the alternative view, the IRS agency operates as a social institution to “normalize” taxpayers. As explained by Kyle Kirkup:

Normalizing judgment . . . involves constant valuation and comparison among and between subjects. A rule or “norm” is constructed that functions as a “minimal threshold . . .,” and with this minimal threshold comes an incentive for subjects to conform: those who fail to conform constantly risk being codified as part of the “abnormal” or “shameful” class.<sup>62</sup>

The filing of the tax return is essentially a test of normalcy.<sup>63</sup> The IRS audit is referred to by the IRS as an “examination,” a term that Foucault also uses.<sup>64</sup> The audit is thus effectively the “grading” of a test to

59. Bryan T. Camp, *The Failure of Adversarial Process in the Administrative State*, 84 IND. L.J. 57, 62 (2009) (“An assessment marks the end of one process—tax determination—and the beginning of another—administrative tax collection. A proper assessment enables the tax lien created by § 6321 to arise. It allows the IRS to begin seizing taxpayer property under its levy authority in § 6331. Finally, and most critically, a proper assessment opens up the § 6502 collection period, which gives the IRS a whopping ten years to collect the tax administratively.”).

60. Camp, *supra* note 20, at 20–21 (“Assessments serve as the Service’s administrative judgment of what taxes a taxpayer owes the government. A properly recorded assessment is the functional equivalent of a judgment against the taxpayer.”).

61. Camp, *supra* note 59, at 64 (“Once a taxpayer receives the Notice of Deficiency, I.R.C. § 6213 allows the taxpayer (generally) ninety days to seek review of the liability determination from a neutral third-party tribunal. Only after the ninety days (or the conclusion of the Tax Court case if the taxpayer timely petitions for review) may the IRS assess.”).

62. Kyle Kirkup, *Indocile Bodies: Gender Identity and Strip Searches in Canadian Criminal Law*, 24 CAN. J.L. & SOC’Y 107, 120 (2009).

63. Andrew Wasieck, *Mental Illness and Crime: Envisioning a Public Health Strategy and Reimagining Mental Health Courts*, 48 CRIM. L. BULL. (2012) (“Foucault’s argument that prisons, asylums, factories, and schools are institutions that act as tools of capitalist dominance and subordination. These tools act as more “humanized” forms of control by abandoning “savage corporal brutality,” but they are still “inextricably tied up with . . . ideology” that seeks to subordinate and transform subjects for its own purposes.”).

64. IRM 4.2 (Apr. 23, 2014).

determine whether a taxpayer meets the standard of normalcy. Foucault describes the examination process as follows:

The procedures of examination were accompanied at the same time by a system of intense registration and of documentary accumulation. A “power of writing” was constituted as an essential part in the mechanisms of discipline. On many points, it was modeled on the traditional methods of administrative documentation, though with particular techniques and important innovations.<sup>65</sup>

In order for the IRS agent to assess normalcy, a set of writings or codification is required—i.e., Internal Revenue Code, Treasury Regulations, even the Internal Revenue Manual. Kirkup explains as follows:

The proliferation of writings on so-called abnormal subjects transforms each individual examination into a “case,” one that is examined from every possible angle by those who sit in hegemonic positions of power. When the individual becomes a case, he or she can be described, judged, measured, compared with others. Further, once made visible, the “cased” individual can begin to be trained or corrected, classified, normalized, excluded, etc. Thus the examination becomes another tool in the discipline and subjection of bodies, especially those bodies that disrupt or otherwise threaten “norms.”<sup>66</sup>

Once formalized, the writings then become an independent standard of normality that does not depend on any one person, such as a monarch, for clarification. To Foucault, this written standard is in part the transition to a technological society.

The IRS uses technological means as part of the examination process. That is, the IRS applies statistical and actuarial techniques to determine whether the taxpayer meets the standard of normalcy.<sup>67</sup> IRS computers now operate in lieu of human judgment in order to identify the “abnormal” taxpayer. The computer system creates the assessment and the collection

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65. FOUCAULT, *supra* note 1, at 189.

66. Kirkup, *supra* note 62, at 122 (internal quotation marks omitted).

67. Simon, *supra* note 19, at 773 (“Actuarial practices are emerging as a dominant force because they further intensify the effectiveness of power set into motion by the rise of the disciplines. It is not, however, simply a question of better technology. The emergence of actuarial practices also marks change in the social environment in which power must be exercised.”).



notice, and the human operator of the system serves only to make sure the computer is operating effectively. As explained by Davis, “Foucault’s theories explain that when . . . the Tax Court, or the IRS classify behavior or biological processes as normal or natural, they are engaged in an exercise of power which is culturally mediated.”<sup>68</sup> In other words, if the human operator re-evaluated the computer’s work, it might become more likely that a particular taxpayer (i.e., a political opponent) would be deemed to be “abnormal” on further review. Thus, the concern is, at least in part, that a taxpayer could be exposed as “abnormal” with incremental scrutiny.

Foucault further posited a societal process of defining the “normal” taxpayer. However, some portion of society must be judged as not normal thus creating the tax “delinquent.” Society must then determine how to deal with the delinquent class. According to Foucault, societal institutions, including the IRS and its collections process that has been set up to deal with the tax “delinquents,” are very much part of society and not separate from it. More specifically, the IRS collection procedure sets and creates the values of modern society.

#### IV. PRIVACY RIGHTS, SURVEILLANCE, AND THE “ALL-SEEING-EYE” OF THE IRS

The key aspect of the Panopticon was the central watch guard tower, which was designed with blackened windows that allowed the guards to see out, but did not allow the prisoners to see in. This created a situation of perfect surveillance and perfect control; the prisoners had no idea at any given time whether the guards were watching or even whether the guards were in the tower at all.<sup>69</sup>

Many persons are familiar with the “all-seeing eye” emblazoned on the top of the pyramid on the back of the one-dollar bill. The true irony is that the United States has now achieved what amounts to a technological “all-seeing eye” over its taxpayers through the computer systems of the IRS. Most of the tax administration activities of the IRS are automated, including both the assessment and collection processes.<sup>70</sup> However, Camp

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68. Tessa Davis, *Reproducing Value: How Tax Law Differentially Values Fertility, Sexuality & Marriage*, 19 CARDOZO J.L. & GENDER 1, 26–27 (2012).

69. Marcy Peek, *The Observer and the Observed: Re-imagining Privacy Dichotomies in Information Privacy Law*, 8 NW. J. TECH. & INTELL. PROP. 51, 51 (2009).

70. Camp, *supra* note 59, at 70–71 (“If the taxpayer does not respond, or cannot resolve the account at the Notice stage, the account moves to the Automated Collection System (ACS) stage. As

explains that the higher the rank of an employee within the IRS bureaucracy the greater the individual discretion to deviate from the computer system or the Internal Revenue Manual.<sup>71</sup>

Foucault describes surveillance generally in terms of the “gaze.” The classic example of a disciplinary gaze is in reference to Bentham’s architectural structure: the Panopticon.<sup>72</sup> Foucault describes Bentham’s Panopticon as follows:

[A]t the periphery, an annular building; at the centre, a tower; this tower is pierced with wide windows that open onto the inner side of the ring; the peripheric building is divided into cells, each of which extends the whole width of the building; they have two windows, one on the inside, corresponding to the windows of the tower; the other, on the outside, allows the light to cross the cell from one end to the other. All that is needed, then, is to place a supervisor in a central tower and to shut up in each cell a madman, a patient, a condemned man, a worker or a schoolboy.<sup>73</sup>

Surveillance enhances discipline mechanisms within social institutions. Persons under surveillance follow the rules by their own cognition, because “[i]n a true panoptic system, the inmates [are] confined by an invisible jailor—subdued into docile submission by his indistinguishable gaze.”<sup>74</sup> The gaze is not solely a penal mechanism; it also pervades schools and tax enforcement. Foucault explains surveillance in the following way:

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its name implies, ACS is also automated; it too operates from campuses. This is the stage where the IRS first sends out levies and files NFTLs. Again, I emphasize that this work is done mainly by computer systems with little human intervention. Computers decide which accounts get priority in processing. Computers interact with other computers to identify types and locations of taxpayer assets (such as employer name, bank accounts, etc.), and computer algorithms determine the most likely levy sources. The CDP Notices required by § 6320 and § 6330 (informing taxpayers of their rights to a Collection Due Process hearing, which I explain below) are automatically issued by computer on form letter LT11, with no human intervention.”).

71. *Id.* at 70 (“IRS employees ‘in’ or ‘at’ the campuses rely heavily on the aggregate decisions reflected in the rules and instructions given to them in that capacious compendium, the *Internal Revenue Manual* (IRM). The IRM instructs employees how to process almost any situation they encounter and provides rules for interacting with taxpayers and interfacing with the computers. IRS employees on the campuses are much more bound by rules than are the IRS employees in the field. As is typical in bureaucracies, discretion widens as an employee moves up the hierarchy.”).

72. FOUCAULT, *supra* note 1, at 214 (“And, in order to be exercised, this power had to be given the instrument of permanent, exhaustive, omnipresent surveillance, capable of making all visible, as long as it could itself remain invisible. It had to be like a faceless gaze that transformed the whole social body into a field of perception: thousands of eyes posted everywhere, mobile attentions ever on the alert”).

73. *Id.* at 200.

74. Patricia A. Powers, Note, *Making a Spectacle of Panopticism: A Theoretical Evaluation of Sex Offender Registration and Notification*, 38 NEW ENG. L. REV. 1049, 1084 (2004).

The perfect disciplinary apparatus would make it possible for a single gaze to see everything constantly. A central point would be both the source of light illuminating everything, and a locus of convergence for everything that must be known: a perfect eye that nothing would escape and a centre towards which all gazes would be turned.<sup>75</sup>

The modern statistical and actuarial processes of the IRS are far more advanced than the “gaze” envisioned by Foucault. The modern surveillance capabilities of the IRS are truly extraordinary. Although the algorithm is a secret, the IRS computer not only cross-references the informational tax returns with the actual tax returns but also performs an evaluative function to assess the quantum of itemized deductions relative to income. This forms the basis for the modern surveillance society.<sup>76</sup> As explained by Cohen: “These observations, which have obvious application to a wide variety of statistical and actuarial practices performed in both government and private sectors, have served as the foundation for elaboration of the work of modern ‘surveillance societies.’”<sup>77</sup>

However, the current version of IRS surveillance differs from Bentham’s vision of the Panopticon in at least one significant way. The Panopticon was conceived with the idea of public access to the social disciplinary institution: “The public would be admitted to the panoptic institution. While inspecting the prisoners, the public would also provide another control function within the institution—keeping the inspectors in line through indirect surveillance of their work.”<sup>78</sup> However, as it currently stands, the public has no access to IRS processes or records, which are held as a carefully guarded secret. The IRS operates to maintain the secrecy of tax records under federal law and not to allow public examination of tax records. Joseph Darby argues that the IRS asks for a great deal of information with the promise to hold it in strict confidence: “[T]he justifiable expectation of the taxpayer that the rather extensive information about his personal and financial life that he is required under

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75. FOUCAULT, *supra* note 1, at 173.

76. *Id.* at 201 (“In view of this, Bentham laid down the principle that power should be visible and unverifiable. Visible: the inmate will constantly have before his eyes the tall outline of the central tower from which he is spied upon. Unverifiable: the inmate must never know whether he is being looked at at any one moment; but he must be sure that he may always be so.”).

77. Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181, 186 (2008).

78. Powers, *supra* note 74, at 1084.

threat of fine or imprisonment to furnish to the tax authorities will be held by them in confidence.”<sup>79</sup> Yet, as Darby explains:

The taxpayer’s right to the confidentiality of information in the files of the tax collector is founded not on the U.S. Constitution, nor on the common law, but rather on Section 6103 of the Internal Revenue Code. This statute establishes a principle of confidentiality, qualified by numerous exceptions designed to assist governmental institutions in the performance of their assigned duties.<sup>80</sup>

Thus, the individual U.S. citizen does not have the right to maintain an inspecting “gaze” over the tax records of other U.S. taxpayers.

An alternative version of the “gaze” in the tax system would be to allow the public to perform the role of the IRS by making tax filings public. The United States did not historically protect tax filings and neither do many other nations. As fully explained by Likhovski, “what seems natural to some—the ‘right’ of taxpayers not to have their income tax information revealed to fellow taxpayers—is actually the outcome of a specific historical trajectory.”<sup>81</sup> A very simple means to enforce the tax laws might be to reduce the amount of information disclosed in the tax return process, all while making such filings public. As Foucault explained, “[a] secret punishment is a punishment half wasted. This approach would also facilitate the decentralization of observational power away from the IRS and to the American public and allow the public “gaze” to disinfect the tax filings, particularly those of publicly traded corporate taxpayers.”<sup>82</sup>

For the small business taxpayer, the omnipresent gaze of the IRS certainly affects behavior, perhaps not always to the benefit of society. “[H]uman beings react differently and engage in a virtual ‘theatre’ when they believe they are being observed.”<sup>83</sup> At a minimum, honest individual and small business taxpayers go to great lengths to create detailed tax records at the prospect of IRS examination. This is true even where the taxpayer could just as easily create an estimate of the tax due, rather than

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79. Joseph J. Darby, *Confidentiality and the Law of Taxation*, 46 AM. J. COMP. L. 577, 577 (1998).

80. *Id.* at 587.

81. Assaf Likhovski, *Chasing Ghosts: On Writing Cultural Histories of Tax Law*, 1 UC IRVINE L. REV. 843, 871–72 (2011).

82. Powers, *supra* note 74, at 1061 (“Panopticism, unlike forms of spectacle punishment, does not centralize power in one person. Instead, power is distributed among the many.”).

83. Peek, *supra* note 69, at 62.

engage in the theatrical presentation required by the IRS on the tax return.<sup>84</sup> The approximate \$10 billion annual budget of the IRS is exceeded by a ratio of 2:1 on the tax compliance expenditures of individual and small business taxpayers.<sup>85</sup>

#### V. TAX DELINQUENCY AND “HOMO OECONOMICUS”

[T]he maxim, “he who wants to live must work”, would be clearly revealed. Work would be compulsory, but so too would be remuneration, which enables the prisoner to improve his lot during and after detention. . . . This reconstruction of homo oeconomicus excluded the use of penalties that were too short—this would prevent the acquisition of habits and skills of work—or too long—which would make any apprenticeship useless.<sup>86</sup>

The specific intent of Congress in designing the tax laws is distinct from the intent of the IRS, which has been charged with the enforcement of the tax laws. Indeed, the teleological objectives of the IRS are potentially preclusive against Congress’ more practical aims. The policy goals of Congress in designing the tax laws reflect a dual purpose. The first goal appears to be to raise revenue consistent with the tax laws. The second goal appears to be to reform the tax cheater into a citizen that will be more willing to contribute to society, in compliance with societal rules. The reformatory goal of punishment thus raises Foucault’s conception of enforcement toward what might be termed taxpayer “discipline.” Congress certainly envisions the enforcement of Foucauldian-style discipline upon noncompliant taxpayers.<sup>87</sup>

Yet, perhaps of major significance to the analysis here, at no point does Congress charge the IRS to establish an absolute “Truth” designed to create a social class of tax delinquents, who may be in violation thereof. Rather, Congress specifically sought to limit the IRS’ enforcement

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84. See Assaf Likhovski, “Training in Citizenship”: Tax Compliance and Modernity, 32 LAW & SOC. INQUIRY 665, 683 (2007) (“Surveillance is related to self-policing, which lessens the need of the state (and nonstate institutions) to constantly monitor their subjects.”).

85. Tax Foundation statistics, available at <http://taxfoundation.org/blog/cost-tax-compliance>.

86. FOUCAULT, *supra* note 1, at 122.

87. *Id.* (“The man who does not find his subsistence must be made to desire to procure it for himself by work; he is offered it by supervision and discipline; in a sense, he is forced to acquire he is then tempted by the bait of gain; corrected in his morals, accustomed to work, his anxiety aroused by the little money he has kept for his release, he has learned a trade ‘that will guarantee a subsistence without danger.’”).

practices.<sup>88</sup> This teleological result is entirely the product of the IRS. The IRS undertakes this quest for “Truth” just as Cervantes describes Don Quixote seeking to enforce an imaginary version of chivalry into the world. The tax penalties set by Congress are not intended to be the penalties of a vengeful medieval wrath against the body of the peasant taxpayer.<sup>89</sup> Only the IRS holds the view that it, alone, is the origin of “Truth” in the tax laws.<sup>90</sup> It is from this teleological premise that the IRS justifies the extraordinary levy and collection powers that destroy the lives of so many Americans. And, it is from this premise that the IRS effectively exempts large corporations and their “well-educated” management teams from any meaningful audit or examination in the enforcement of the tax laws.

Foucault identifies the social institution of the prison as designed to create a “homo oeconomicus” in the form of a worker with a more “docile body.”<sup>91</sup> The pejorative nomenclature indicates that Foucault may hold the attempted re-characterization of the “soul” of mankind in purely economic terms of disdain. But, any debate as to whether the IRS, as an administrative agency, ought to be used as a means to create a more disciplined form of worker for the benefit of capitalist industry is a question for the Congress.<sup>92</sup> But, the issue is at this point moot.<sup>93</sup> If

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88. Camp, *supra* note 59, at 76 (“The Conference Committee report instructs the IRS to create a new category of persons eligible to compromise their liabilities: those whose classification as can’t-pay (through the act of compromising the liability) would ‘promote effective tax administration’ because of ‘factors such as equity, hardship, and public policy.’”).

89. FOUCAULT, *supra* note 1, at 90 (“The right to punish has been shifted from the vengeance of the sovereign to the defence of society. But it now finds itself recombined with elements so strong that it becomes almost more to be feared. The malefactor has been saved from a threat that is by its very nature excessive, but he is exposed to a penalty that seems to be without bounds. It is a return to a terrible ‘super-power’. It brings with it the need to establish a principle of moderation for the power of punishment.”).

90. Camp, *supra* note 20, at 83 (“For example, if determining one’s tax liability becomes so complicated that reasonable minds can disagree on the “proper” tax, then it becomes difficult to maintain there is a “proper” tax at all. Tax liabilities become contingent on circumstances, the most important being the identity of the decisionmaker.”).

91. FOUCAULT, *supra* note 1, at 136 (“A body is docile that may be subjected, used, transformed and improved.”).

92. *Id.* at 153 (“One is as far as possible from those forms of subjection that demanded of the body only signs or products, forms of expression or the result of labour. The regulation imposed by power is at the same time the law of construction of the operation. Thus disciplinary power appears to have the function not so much of deduction as of synthesis, not so much of exploitation of the product as of coercive link with the apparatus of production.”).

93. FOUCAULT, *supra* note 1, at 221 (“In fact, the two processes—the accumulation of men and the accumulation of capital—cannot be separated; it would not have been possible to solve the problem of the accumulation of men without the growth of an apparatus of production capable of both sustaining them and using them; conversely, the techniques that made the cumulative multiplicity of men useful accelerated the accumulation of capital.”).

Congress intended to empower the IRS to encourage a more docile form of worker along the lines of “homo oeconomicus,” then the IRS has declined to adopt such an approach as part of its enforcement practices against low-income taxpayers.

#### VI. THE FATE OF THE TAX DELINQUENT: THE “PHILADELPHIA”-STYLE PRISON WITHOUT WALLS

Then came the Philadelphia model. This was no doubt the most famous because it was associated in people’s minds with the political innovations of the American system and also because it was not, like the others, doomed to immediate failure and abandonment . . . [T]he prisoners were also rewarded individually as a way of reinserting them morally and materially into the strict world of the economy; by keeping the prisoners “constantly employed on productive works, they were able to defray the expenses of the prison, they were not left idle and they were able to save a little money for the time when their captivity would cease”.<sup>94</sup>

On the one hand, the Congressional policy objectives imply a reformative element.<sup>95</sup> That is, the taxpayer must accept the taxing authority of the state and comply. If she does, then she ought to be welcomed back into society without being branded a criminal. The reformative idea is that, even as a tax offender, the person still has value to society as a potential worker or taxpayer. Congress does not appear interested in branding individuals as a form of social outcast merely from a tax infraction.

On the other hand, the IRS teleological policy objectives are not reformatory. In the quest for absolute “Truth,” the IRS is quite willing and able to brand individuals as delinquent. This accomplishes three policy objectives for the IRS not contemplated by Congress. First, the labeling establishes that the IRS is able to find “Truth” in the tax laws. This

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94. FOUCAULT, *supra* note 1, at 123–24.

95. Assaf Likhovski, *supra* note 84, at 666–67 (“Tranter suggested that the state deal with ‘curable evaders’ by appealing to their sense of patriotism; by educating them in the basics of ‘civics’; by initiating public relations campaigns; by utilizing the services of teachers, accountants, and the clergy; and by declaring tax amnesties. As for ‘incurable’ tax evaders, Tranter had the following suggestion: ‘So far evasion is not a certifiable form of insanity nor are there yet mental hospitals which admit to their wards for kleptomaniacs those convicted of taxation frauds. We segregate those demonstrably and incurably anti-social in a physical sense, such as confirmed criminals, and those anti-social in a mental sense, such as lunatics and idiots, but not yet those anti-social in an economic sense.’”) (citations omitted).

represents an institutional self-affirmation for the IRS of its own groupthink. Second, the labeling allows the IRS to justify the levy of property against the delinquent taxpayer over an extended period of time. This represents a psychological justification for creditor behavior that would otherwise be considered wrong if applied to a class of law-abiding citizens.<sup>96</sup> Third, the branding of taxpayers is an exercise of power directly over other persons.<sup>97</sup> Any tax practitioner involved in an IRS audit can attest to the “power trip” of some tax auditors within the IRS.

The culmination of the IRS assessment and collections process creates a tax “delinquent” who owes the IRS a *de minimis* amount of money. The most common form of tax delinquency in my experience is an improper claim of the Earned Income Tax Credit (“EITC”) based on a misunderstanding of the extraordinarily technical eligibility rules.<sup>98</sup> The hypocrisy of taxing the wages of the working poor at confiscatory rates and attempting to reverse the taxes with the EITC ought to be readily apparent to all concerned.<sup>99</sup> For low-income persons, it may have been preferable if Congress had never implemented the EITC in the first place. The effect of a tax levy upon a person wrongly claiming the EITC is perhaps best explained by Foucault: “The wages of penal labour do not reward production; they function as a motive and measure of individual transformation: it is a legal fiction, since it does not represent the ‘free’ granting of labour power, but an artifice that is presumed to be effective in the techniques of correction.”<sup>100</sup>

The tax delinquent often becomes aware of an IRS collection process when his or her bank account or wages are garnished (often, the IRS notices are mailed to a former address where the tax delinquent was a

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96. Camp, *supra* note 20, at 26–27 (“Unlike private creditors, the Service could generally collect the tax without judicial aid, choosing what assets to seize or, if the liability were joint, which taxpayer to collect from. Under section 6323 it could file a Notice of Federal Tax Lien which would take priority over all but a very few favored creditors. Under section 6331 it could seize or levy first, then adjudicate ownership later. Indeed, the Service ‘pursued the administrative practice . . . of seizing any property found in the possession, custody or control of the person against whom the tax had been imposed.’”).

97. See generally Bret N. Bogenschneider, *The Will to Tax Avoidance: Nietzsche and Libertarian Jurisprudence*, [2014] J. JURISPRUDENCE 321, 323 (“Rather, to Libertarians the activity of tax avoidance represents a more fundamental Will to Power by the individual against the state, and also a display of power over other regular, wage-earning, perhaps “lesser” taxpayers. This then describes the Will to Power by the Libertarian over *income taxes* as a fundamental aspect of tax policy.”).

98. 26 U.S.C. § 32 (2011); Leslie Book, *EITC Noncompliance: What We Don’t Know Can Hurt Them*, 99 TAX NOTES 1821, 1821 (2003).

99. See generally Lawrence Zelenak, *Redesigning the Earned Income Tax Credit as a Family-Size Adjustment to the Minimum Wage*, 57 TAX L. REV. 301 (2004); Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995).

100. FOUCAULT, *supra* note 1, at 243.



lessee and, therefore, the tax delinquent may not have received the IRS notice in a timely fashion). At that point, the tax delinquent becomes unable to pay other bills over which the IRS levy has prioritized itself. The tax delinquent thus becomes subject to other creditor claims. Thus, the question arises as to whether the tax delinquent ought to continue working in a low-wage position while subject to IRS levy. The answer is usually “no;” the taxpayer finds the position to be hopeless and stops actively working to avoid the IRS levy. Notably, in my experience, this result occurs even where the taxpayer would be better off by continuing to work and paying off the creditors over a period of time. This simply is not human nature. As such, the tax delinquent generally arrives at the doorstep of the state and local government as a completely penniless ward of the state. In applications for food stamps and subsidized housing, the state government will check for any accumulated assets but, of course, will find none as the IRS has taken any assets the taxpayer might otherwise have enjoyed. Upon arrival at the doorstep of the state for social support, Foucault observes: “Delinquency is the vengeance of the prison on justice. It is a revenge formidable enough to leave the judge speechless.”<sup>101</sup>

From a Foucauldian perspective, the consequences for a modern tax “delinquent” should be compared with other possible punishments. The tax delinquent is not subject to enclosure in a confined space.<sup>102</sup> The tax delinquent is not forced to hard labor.<sup>103</sup> Rather, here the punishment actually encourages the taxpayer not to work, whereas she had an incentive to work prior to the IRS’ collection efforts. In fact, only low-income, but *working*, taxpayers are eligible for the EITC. So, by definition, the IRS’s collection efforts are focused on reclassifying the working poor into a new class of tax “delinquents,” without providing an incentive to work. The tax “delinquent” is effectively subjected to public reprimand, fines, civil assessments, and seizure of assets. The tax “delinquent” is ostracized, and becomes unwilling to work or contribute to society. Because wages are subject to extraordinarily high rates of taxation in any case,<sup>104</sup> it is very unlikely that the IRS will collect more net revenue by garnishing the bank accounts of the working poor than simply by continuing to withhold taxes and allowing the person to work. In any case,

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101. *Id.* at 255.

102. *Id.* at 141.

103. *Id.* at 149.

104. See Bret N. Bogenschneider, *The Effective Tax Rate of U.S. Persons by Income Level*, 145 TAX NOTES 117, 118 (2014) (calculating an “American Dream” effective tax rate as a tax rate applicable to a person with education and health care expense).

the outcome is that the tax delinquent is in a form of financial prison to which she cannot escape. When the tax “delinquent” drops out of society, it is hardly an exaggeration to describe this as the financial “execution” of the working poor in American society. This outcome represents Foucault’s Philadelphia-style prison for tax delinquents in modern America but without walls or any possibility of reformation or the rejoining of society.

#### VII. “SINS” OF THE TAXPAYER

The IRS automated computer system was created during the 1960s.<sup>105</sup> This computer system came to be a form of an actualized “god” in terms of its surveillance capability; such “god” is now very *real* and *omnipresent* in the lives of Americans. The “god”-like system functions autonomously in both the tax assessment and collections processes. Any human beings at the IRS are required primarily to watch over the operation of the system. How exactly the IRS computer system functions remains a carefully guarded secret. But, upon any sin, *even a math error*, the taxpayer receives a notification automatically, as if merely to prove the “god’s” very existence. The IRS computer system now *automatically* issues an assessment or violation notice on behalf of the IRS. If the taxpayer “confesses” and pays the assessment plus a penalty, then the taxpayer achieves atonement before the “god.” If the taxpayer refuses to “confess,” then the IRS computer issues an automatic collection notice. This collection notice then authorizes the IRS revenue agent to begin the audit—the “torture” of the taxpayer. If the taxpayer is innocent, then she might ultimately withstand such torture.<sup>106</sup>

In most cases, the will of the computer is inscrutable and unknowable to the subject taxpayers. The “god” is sometimes pleased. In that case, the taxpayer receives a surprise check. The “god” is sometimes displeased. In that case, the taxpayer receives a surprise assessment. Most people implicitly believe in a vengeful IRS, because the surprises are usually negative. Indeed, the “god” physically manifests in the arrival of actual letters in the mailbox. We therefore presume that the “god” exists. Yet, there are non-believers in modern society. The non-believers are referred to as tax-protestors.<sup>107</sup> As in the medieval period, a champion lawyer of the Department of Justice publicly performs the prosecution of protestors.

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105. Camp, *supra* note 59, at 60.

106. FOUCAULT, *supra* note 1, at 40–41 (“[F]or the rule was that if the accused ‘held out’ and did not confess, the magistrate was forced to drop the charges. The tortured man had then won.”).

107. See IRS Notice 2015-23 (“The Truth about Frivolous Tax Arguments”).

As described in detail by Foucault, this outcome is the modern equivalent of the display of the dead and mutilated body of the medieval criminal, hung with a placard at the crossroads in front of the castle as a warning to passers-by.<sup>108</sup>

The average American interacts with the government on a biweekly basis through the withholding of tax tithes out of her paycheck. The automatic taking of money describes the primary relation of government to the governed in the United States. Congress delegated its taxing power in its entirety to the IRS. Since no IRS officials are elected by the people they govern, the idea that the United States is a “representative, constitutional democracy” does not accurately describe the interaction of the average American with the government via tax enforcement procedure.

#### CONCLUSION

[Society] understand[s] the term “democracy” to refer to the process by which people create for themselves the form of organized existence within which they live. Only by creating these forms together can people confront the intersubjective nature of social life. Moreover, unless people do so themselves, the artificial structures through which they operate will threaten to function beyond their control.<sup>109</sup>

With the delegation of the taxing authority to the IRS, an administrative agency, the United States Congress indirectly empowered the IRS to exact punishment for tax crimes in a manner that is not consistent with the freedom of individuals and is also extraordinarily impractical.<sup>110</sup> Indeed, the IRS appears to collect far less in enforcement revenue than the amount of social costs that it imparts upon American society. Nelson argues that without a steady supply of criminals there would be no need for police services.<sup>111</sup> With regard to the IRS, Nelson’s observation is greatly magnified. Since the IRS often engages in the

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108. *Id.* at 113 (“At the crossroads, in the gardens, at the side of roads being repaired or bridges built, in workshops open to all, in the depths of mines that may be visited, will be hundreds of tiny theatres of punishment.”).

109. Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1296 (1984).

110. *Id.* at 1295 (“Bureaucracy is the primary form of organized power in America today, and it is therefore a primary target for those who seek liberation from modern forms of human domination. The ideology that reassures us that bureaucracy is legitimate is demobilizing because it conceals the need to reorder American society to bring to life better versions of the ideal of human freedom.”).

111. Nelson, *supra* note 28, at 59.

redefinition of “Truth” as part of tax enforcement proceedings to its own definition irrespective of the actual tax law. Thus, the IRS directly creates “wrongdoing” as part of its enforcement process thereby itself creates the resultant tax delinquents within society. The tax law is indeterminate and the IRS uses its enforcement discretion principally to create tax delinquents. Accordingly, Nelson is quite right in her observation that there would not be as many tax delinquents if the IRS adopted a more pragmatic approach to the interpretation of tax laws.

The punishment enforced by the IRS on persons who act in violation of its will is representative of its power and directly analogous to those punishments described by Foucault in *Discipline and Punish*. Rubin argues that “*Discipline and Punish* may be read to assert that freedom from the comprehensive, oppressive control mechanisms of modern society can only be achieved by transforming the specific and apparently functional elements of modern social institutions.”<sup>112</sup> However, as described by Simon, judges often rationalize the punishment of wrongdoers with a reformatory goal.<sup>113</sup> In the context of IRS punishment, however, there is no reformatory goal. The automated IRS acts exactly as an actuary machine in its enforcement actions against individual taxpayers.<sup>114</sup> According to Simon, that means the actuary tries to “maximize the efficiency of the population as it stands . . . [r]ather than seeking to change people.”<sup>115</sup> But, the operation of the bureaucracy for the enlightenment of society is the stated purpose of any bureaucracy.<sup>116</sup> In the modern United States, the bureaucracy operates primarily for the sake of bureaucracy. The creation of a social class of permanent tax delinquents within the United States represents at minimum an extraordinarily expensive and impractical tax policy.

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112. Edward L. Rubin, Commentary, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1421 (1996).

113. Jonathan Simon, *The Return of the Medical Model: Disease and the Meaning of Imprisonment from John Howard to Brown v. Plata*, 48 HARV. C.R.-C.L. L. REV. 217, 232 (2013).

114. Simon, *supra* note 19, at 797 (“Lacking any imaginable regression coefficient that could prove the effects of actuarial practices, we are left with only the possibility of shared responses to the way these practices operate on us as rituals . . . As the institutional fabric of society is colonized by actuarial practices it becomes more difficult to invoke political and moral responses in ourselves and others”).

115. *Id.* at 773 (“Rather than seeking to change people (‘normalize them,’ in Foucault’s apt phrase), an actuarial regime seeks to manage them in place.”).

116. See King, *supra* note 4 at 194 (“A great deference, then, must be given to the state in conducting its activities for the benefit of its constituent individuals; after all, that is what the state was founded to do. This means its methods, if within reason, cannot be questioned as long as it achieves the goal of enlightenment.”).